

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT RICHARDSON and MYRA
RICHARDSON,

UNPUBLISHED
March 16, 2006

Plaintiff-Appellants,

v

No. 264547
Oakland Circuit Court
LC No. 03-049562-CH

FLAGSTAR BANK, FSB, and FLAGSTAR
BANCORP INCORPORATED,

Defendant-Appellees,

and

STANDARD FEDERAL BANK,

Defendant/Cross-Plaintiff-Appellee,

and

METROPOLITAN TITLE COMPANY,

Defendant/Cross-Defendant-
Appellee.

Before: Schuette, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition in favor of defendant, Metropolitan Title Company ("Metropolitan"). Plaintiffs also challenge the trial court's earlier order granting summary disposition in favor of defendant, Flagstar Bank, FSB, Flagstar Bancorp Inc. (collectively "Flagstar"), and Standard Federal Bank ("Standard Federal"). We affirm.

We review de novo a trial court's determination regarding a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The proper interpretation of a contract, which is a question of law, is also reviewed de novo. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003).

The trial court's orders granting summary disposition do not state a court rule upon which the court's decision is based. However, it is clear from the record that the court looked beyond the pleadings in deciding defendants' motions. Although the trial court did not expressly articulate which of these subrules it relied on in granting defendants' motion, because the court looked beyond the pleadings in deciding the motion, this Court reviews the motion as having been granted under MCR 2.116(C)(10). See *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999). "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

I. Breach of Contract

Plaintiffs argue that the trial court erred by dismissing their breach of contract claim against defendants. The goal of contract construction is to determine and enforce the parties' intent based on the plain language of the contract itself. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). A court must first determine as a matter of law whether the language is clear and unambiguous; if so, its meaning presents a question of law for the courts to determine. *Id.* The language should be construed according to its plain and ordinary meaning; the court should avoid technical or constrained constructions. *Id.* at 491-492. On the other hand, contract language is ambiguous if it may be reasonably understood in different ways. *Id.* at 491. If the language is found to be ambiguous or unclear, the trier of fact must determine the intent of the parties. *Id.* at 492. Here, the pertinent contract language provides:

Section 2.7.4

Advances: Conditions to Advances

Each of the promises and representations I make anywhere in this Loan Agreement shall be considered made or made again, as applicable, as of the time (i) Lender receives any request from me and the Contractor for Advance ("Request for Advance"); (ii) I endorse any Loan Proceeds check to Contractor or a Supplier, or (iii) I in any other manner authorize Lender to make an Advance. Advances will be made only if all of the following conditions are satisfied:

* * *

2.7.4.4 Request for Advance; Invoices and Lien Waivers. Contractor will deliver to Lender, at no cost to Lender, (i) a written request for Advance, specifying the amount requested and the payee, specifying or incorporating by reference a description of the work done, and signed by the Contractor; (ii) the invoices for the Work; (iii) unconditional construction lien waivers satisfactory to Lender and Title Company from Contractor and from Suppliers for all Work covered by the Request for Advance; and (iv) an endorsement to the Title Policy,

issue by the Title Company, insuring Lender for the total amount of the Loan advanced, including the requested Advance and protective advances, insuring that Lender's lien continues to be the first lien as of the date of the Advance, and including a UCC search. Lender may rely on my statements and Contractor's statements in the Request for Advance and the invoices and lien waivers submitted by Contractor. Lender does not have to verify any of that information. The funds obtained with the Request for Advance will be used to pay in full for the Work described in the Request for Advance.

* * *

2.7.6

Application of Advances. Anything contained in this Loan Agreement to the contrary notwithstanding:

* * *

2.7.6.2 Direct Advances. At its option, Lender may make any or all Advances directly to the Title Company or to any subcontractor, supplier, or any other person due payment for labor, material, or services performed on the Property.

It is uncontroverted that the contractor, Paradigm Building Co., Inc., requested and was wired cash advances originating from Flagstar, through Metropolitan, and into an account at Standard Federal, which, under the plain terms of sections 2.7.4 and 2.7.6.2, was permissible. Plaintiffs contend that Metropolitan, as Flagstar's agent, breached the contract by not securing plaintiffs' endorsements on the checks prior to depositing them at Standard Federal. Metropolitan, however, provided the trial court with an authorization signed by plaintiffs that allowed Metropolitan to disperse the checks to Paradigm directly without endorsement. The authorization states: "We, the undersigned, do hereby acknowledge that any funds disbursed to Paradigm Building Company, including but not limited to past draw proceeds or future draw proceeds, are authorized." Although plaintiffs allege that this authorization is a forged document, the lower court record is devoid of any evidence supporting that assertion. To the contrary, Paradigm's employees, John Przystup and David Steffes, provided signed affidavits to the trial court stating that they had witnessed plaintiffs sign the January 25, 2002, authorization. Plaintiffs also fail to provide any evidence that Standard Federal breached a contract with plaintiffs. Thus, the trial court correctly dismissed plaintiffs' breach of contract action against all defendants as a matter of law. MCR 2.116(C)(10).

II. Michigan Consumer Protection Act

The trial court correctly dismissed plaintiffs' Michigan consumer protection act claims. Plaintiffs allege that Flagstar and Metropolitan committed numerous violations of the Michigan consumer protection act. Plaintiffs essentially allege that Flagstar and Metropolitan's decision to advance payments to Paradigm in contravention of the construction loan agreement constitute false or deceptive acts or practices in violation of MCL 445.903. Flagstar, however, is exempt from the Michigan consumer protection act under MCL 445.904(1)(a) because the act does not apply to the lending activity of banks. *Newton v Bank West*, 262 Mich App 434; 686 NW2d 491

(2004). Regardless, plaintiffs' consumer protection act claims are predicated on Flagstar's and Metropolitan's alleged violations of the construction loan agreement, which, as discussed, is without merit. The trial court properly dismissed plaintiffs' consumer protection act claims as a matter of law. MCR 2.116(C)(10).

III. Conversion and Fraud

The trial court properly dismissed plaintiffs' claims for conversion and fraud. This Court has defined conversion as “any distinct act of dominion wrongfully exerted over another's personal property.” *Brennan v Edward D Jones & Co*, 245 Mich App 156, 158; 626 NW2d 917 (2001), quoting *Trail Clinic, PC v Bloch*, 114 Mich App 700, 705; 319 NW2d 638 (1982). As discussed, there is no evidence that Flagstar or Metropolitan acted improperly under the terms of the contract. Accordingly, there is no evidence of “any distinct act of dominion wrongfully exerted over” plaintiffs' personal property. *Brennen, supra* at 158.

Plaintiffs' claim of fraud is also without merit. The elements of a claim for fraud are: (1) a material representation, (2) the representation was false, (3) when the party made the representation, the party knew that it was false, or the party made it recklessly, without knowledge of its truth, and as a positive assertion, (4) the party made the representation intending that the plaintiff should act on it, (5) the plaintiff acted in reliance on the representation, and (6) the plaintiff suffered injury as a result of his reliance on the representation. *Hord v Environmental Research Institute of Michigan (After Remand)*, 463 Mich 399, 404; 617 NW2d 543 (2000). Plaintiffs fraud claim is also predicated on defendants' alleged failures to perform under the terms of the contract, which, as discussed, is without merit. Accordingly, plaintiffs cannot show that a false representation was made. Summary disposition of plaintiffs' fraud claim was proper as a matter of law. MCR 2.116(C)(10).

Affirmed.

/s/ Bill Schuette
/s/ Christopher M. Murray
/s/ Pat M. Donofrio